

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,)	CASE NO. 8:04CR302
)	
Plaintiff,)	
)	MEMORANDUM
vs.)	AND ORDER
)	
JOZABET CASTRO-GARZON,)	
)	
Defendant.)	

This matter is before the Court on the Defendant's Notice of Appeal (Filing No. 241). The Defendant appeals from the order (Filing No. 240) denying reconsideration of the earlier order (Filing No. 238) in which the Court denied the Defendant's motion for a certificate of appealability (Filing No. 237). A motion under 28 U.S.C. § 2255 was never filed, and therefore no basis exists to support the issuance of a certificate of appealability. (Filing No. 238.) Federal Rule of Appellate Procedure 24 governs the Defendant's ability to proceed in forma pauperis in this appeal.

Before the Defendant may appeal the denial of a § 2255 motion, a "Certificate of Appealability" must issue. Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), the right to appeal the denial of a § 2255 motion is governed by the certificate of appealability requirements of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c)(2) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

....

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

A “substantial showing of the denial of a constitutional right” requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were “adequate to deserve encouragement to proceed further.”” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

The Court concludes that the Defendant has neither filed a § 2255 motion nor made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c).

IT IS ORDERED:

1. A certificate of appealability is denied;
2. The Court denies the Defendant leave to proceed in forma pauperis on appeal;
3. The Clerk of Court shall provide a copy of this Memorandum and Order to the Eighth Circuit Court of Appeals; and
4. A copy of this memorandum and order shall be mailed to the Defendant at his last known address.

DATED this 24th day of June, 2009.

BY THE COURT

s/Laurie Smith Camp
United States District Judge